A **AMALAN TEPAT SDN BHD**

v.

NG KIAN TENG

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: W-02-1444-2008]
C 28 DECEMBER 2011

CONTRACT: *Agreement - Breach - Rental return agreement - Guarantee - Whether respondent rightfully terminated sale agreement - Seeking refund of purchase price - Alternative claim for loss of rental* D *allowed by High Court - Whether claim for loss of rental contrary to respondent's own pleading - Whether there was provision in sale agreement on guaranteed rental return - Whether there was basis to allow alternative claim for loss of rental - Whether court below erred in allowing respondent's alternative claim*

E The appellant was the developer of a project in A Famosa Resort, Melaka. With an assurance of a rental return guarantee for four consecutive years commencing from the date of issuance of the certificate of fitness ('CF'), the respondent purchased a piece of land from the appellant at the purchase price of RM415,273. After F paying 10% deposit of the purchase price, the respondent was given the certificate of rental guarantee ('CRG') and took vacant possession of the property. Subsequently, the appellant inquired as to whether the respondent would want to participate in the rental scheme. The respondent agreed to participate but went on to G propose some amendments to the guaranteed rental scheme agreement ('GRRA') to which the appellant disagreed. As he had no intention of occupying the property, the respondent sent a notice of termination, seeking refund of the full purchase price and RM60,542.37 in damages for breach of contract. The respondent H later sought for a declaration that he had, *inter alia*, rightfully terminated the sale agreement and for an order that the appellant refund the purchase price of RM415,273. He also claimed for rental losses amounting to RM166,109.20 being the four years net rental, guaranteed by the appellant. In the High Court, the I respondent's main claim was dismissed as it was found that there

was full performance of the sale agreement. However, the alternative claim was allowed on the ground that the guarantee under the CRG was a separate document. The issue in this appeal was whether the court below was right in allowing the respondent's alternative claim after dismissing his main claim for a declaration to terminate the sale and purchase agreement.

Held (allowing appeal and setting aside order of court below) Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) There was no merit in the contention that under the terms of the CRG, the respondent was not required to enter into a guaranteed rental return agreement. The guaranteed rental return under the CRG was conditional upon the respondent agreeing to leaseback the property to the appellant. (para 14)

(2) The alternative claim for loss of rental was contrary to the respondent's own pleading and should not be allowed. The alternative claim was not based on a separate cause of action and cannot be based on the appellant's alleged breach of the CRG as the respondent had not complied with the conditions. For similar reason, it would have also been premature to claim specific performance of the CRG. The guarantee for rental return was subject to the proviso that the respondent, *inter alia*, agreed to lease the property to the appellant. (para 15)

(3) The alleged breach was that the appellant had imposed certain terms and conditions in the GRRA which were unreasonable and contrary to the CRG. Once the prayer for the declaration was dismissed and that there was no breach of the sale agreement, the alternative claim should be dismissed as well. There was no provision in the sale agreement on guaranteed rental return. Therefore, there was absolutely no basis to allow the alternative claim for loss of rental. (para 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merupakan pemaju projek di A Famosa Resort, Melaka. Dengan jaminan pulangan sewa selama empat tahun berturut-turut bermula dari tarikh pengeluaran sijil layak menduduki ('CF'), responden telah membeli sebidang tanah daripada perayu dengan harga belian sebanyak RM415,273. Selepas membayar deposit 10% daripada harga belian, responden telah diberikan sijil jaminan sewa

A ('CRG') dan mengambil milikan kosong harta tersebut. Seterusnya, perayu menanyakan sama ada responden mahu terlibat dalam skim sewa. Responden bersetuju untuk menyertai tetapi telah mencadangkan beberapa pindaan kepada perjanjian skim jaminan sewa ('GRRA') yang mana tidak dipersetujui oleh perayu. Oleh
B kerana dia tidak berniat untuk menduduki harta tersebut, responden menghantar notis penamatan, mendapatkan bayaran balik harga belian penuh dan ganti rugi sebanyak RM60,542.37 bagi pelanggaran kontrak. Responden kemudian mendapatkan perisytiharan bahawa dia, antara lain, berhak menamatkan
C perjanjian jual dan untuk mendapatkan perintah bahawa perayu membayar balik harga pembelian sebanyak RM415, 273. Dia juga menuntut kerugian sewa yang berjumlah RM166,109.20 iaitu sewa bersih selama empat tahun yang dijamin oleh perayu. Di Mahkamah Tinggi, tuntutan utama responden telah ditolak kerana
D diputuskan bahawa terdapat pelaksanaan penuh perjanjian jual beli. Walau bagaimanapun, tuntutan alternatif telah dibenarkan atas alasan bahawa jaminan di bawah CRG adalah satu dokumen yang berasingan. Isu dalam rayuan ini adalah sama ada mahkamah bawah bertindak betul dalam membenarkan tuntutan alternatif
E responden selepas menolak tuntutan utama bagi perisytiharan untuk menamatkan perjanjian jual beli.

Diputuskan (membenarkan rayuan dan mengetepikan perintah mahkamah di bawah)

F **Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:**

(1) Tiada merit dalam hujahan bahawa di bawah syarat-syarat CRG, responden tidak perlu memasuki perjanjian skim jaminan sewa. Jaminan pulangan sewa di bawah CRG adalah tertakluk
G kepada responden jika dia bersetuju untuk memajak semula harta tersebut kepada perayu.

(2) Tuntutan alternatif untuk kehilangan sewa adalah bertentangan dengan pliding responden sendiri dan tidak harus dibenarkan.
H Tuntutan alternatif tersebut tidak berasaskan pada suatu kausa tindakan yang berasingan dan tidak boleh disandarkan pada kemungkiran perayu ke atas CRG kerana responden telah tidak mematuhi syarat-syarat. Bagi sebab yang sama, ia juga terlalu awal untuk menuntut pelaksanaan spesifik ke atas CRG.
I Jaminan untuk pulangan sewa adalah tertakluk kepada proviso bahawa responden, antara lain, bersetuju untuk memajakkan semula harta tersebut kepada perayu.

(3) Pelanggaran yang didakwa adalah bahawa perayu telah dikenakan terma dan syarat-syarat tertentu dalam GRRA yang tidak munasabah dan bertentangan dengan CRG. Apabila permohonan bagi perisytiharan tersebut ditolak dan tiada pelanggaran perjanjian jualan, tuntutan alternatif harus ditolak juga. Tiada peruntukan dalam perjanjian jual beli bagi jaminan pulangan sewa. Oleh itu, tidak terdapat asas langsung untuk membenarkan tuntutan alternatif bagi kehilangan sewa.

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

For the appellant - KL Wong (Mahendran with him); M/s RY Nathan & Partners

For the respondent - Yongeswary Singam (Tan Lee Eng with him); M/s Tan Norizan & Assocs

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-22-1523-2003]

Reported by Najib Tamby

JUDGMENT

Abu Samah Nordin JCA:

[1] There is only one issue in this appeal. It is whether the learned judicial commissioner ("JC") was right in allowing the respondent's alternative claim after having dismissed his main claim for a declaration that he had rightly terminated the Sale and Purchase Agreement ("the Sale Agreement") which he entered into with the appellant.

[2] The background facts leading to the filing of this suit by the respondent against the appellant can be shortly stated as follows. The appellant was the developer of a project, known as 'A Famosa Resort', Melaka. The respondent purchased from the appellant a piece of land held under Lot PT793 together with a single storey bungalow to be built thereon ('the property') at a purchase price of RM415,273.

[3] It is the respondent's pleaded case that he purchased the property based on the representations and assurances made by the appellant that a purchaser would be guaranteed with a rental return of a gross sum equivalent to 13% of the purchase price or a net sum equivalent to 10% of the purchase price per annum for four consecutive years with effect from the date of issuance of the certificate of fitness ("CF").

[4] After paying the 10% deposit for the purchase of the property the appellant gave the respondent a written guarantee, namely, the Certificate of Rental Guarantee ("CRG"). The CRG states that the respondent would be guaranteed a rental return of a sum equivalent to:

> (a) gross (rental) sum equivalent to 13% of the Purchase Price for each year wherein you shall further be liable to pay to us and/or to the respective parties the housekeeping charges amounting to 25% of the gross (rental) sum and maintenance charges of the Property; or
>
> (b) net (rental) sum equivalent to 10% of the purchase price for each year (after deducting the housekeeping charges and maintenance charges of the said property).
>
> WHICHEVER IS HIGHER for a period of two (2) years from the date the certificate of fitness for occupation of the property is issued by the relevant authority with an option to renew of another two (2) years provided always that:
>
> (i) ...
>
> (ii) We shall lease the property on your behalf;
>
> (iii) You shall execute a Letter of Undertaking addressed to us in respect of the rental return scheme and you shall fully furnish the property in accordance with our specifications.

[5] The respondent took vacant possession of the property together with the keys to the single storey bungalow after he had paid the full purchase price and all other outstanding payments. The CF was issued on 7 February 2002.

[6] On 6 August 2002 the appellant wrote to the respondent asking him to reconfirm whether he agreed to participate in the rental scheme and if so, to sign a letter of undertaking confirming his agreement and that he agreed to have his property furnished in accordance with the appellant's specifications with the costs of furnishing to be borne by the respondent.

[7] The respondent agreed to participate in the rental scheme and to pay the cost of furnishing the property but disagreed with some of the terms in the proposed leaseback agreement, known as Guaranteed Rental Scheme Agreement ('GRRA'), which he considered as unreasonable and contrary to the CRG and had the effect of varying the terms in the CRG. For instance the terms in the GRRA confer on the appellant the discretion to vary the date of commencement of tenancy from the date of issuance of CF to a date to be determined by the appellant; to amend or add new provisions to the GRRA and to require the respondent to give an irrevocable power to the appellant to deduct any amount due under the GRRA. He had proposed some amendments to the terms and conditions in the GRRA, which the appellant disagreed.

[8] This led to a stalemate. The property was left vacant in its original state of condition and remained unattended as the respondent had no intention to stay there. Feeling cheated, he decided to terminate the sale agreement, return the property to the appellant and ask for a refund of the full purchase price plus some other costs.

[9] By a letter dated 25 March 2003, the respondent's solicitor sent a notice of termination of the sale agreement to the appellant, "on the ground of your fundamental breach of the rental guaranteed scheme" and demanded a refund of the full purchase price and damages for breach of contract in the sum of RM60,542.37. The words, "rental guaranteed scheme" in the said letter refer to the CRG and not the GRRA.

[10] On 30 September 2003 the respondent commenced this action for a declaration that he had rightfully terminated the sale agreement due to the said fundamental breach; and for an order that the appellant refund the full purchase price of RM415,273, pay all other outgoings and/or expenses in respect of the property and upon satisfaction thereof the property be transferred to the appellant, at its own cost and expense.

[11] Alternatively, the respondent claims a loss of rental amounting to RM166,109.20, (RM41,527.30 x 4 years) being the four (4) years net rental as guaranteed by the appellant.

[12] The learned JC dismissed the respondent's claim for the said declaration on the ground that there was full performance of the sale agreement. The dismissal of the respondent's claim for the said declaration means that the appellant had not committed any

fundamental breach of the sale agreement. There was no appeal by the respondent against that decision. The learned JC however allowed the alternative claim for loss of rental in the sum of RM166,109.20 on the ground that the guarantee under the CRG was a distinct document independent of the sale agreement. The learned JC held that there was no provision in the sale agreement requiring the respondent to sign the GRRA.

[13] Learned counsel for the appellant submitted that the claim for loss of rental under the CRG was not pleaded and should not be allowed. The respondent's cause of action is not based on breach of the terms of the CRG. Its cause of action is based on the breach of the sale agreement. It was further submitted that the guaranteed rental return is conditional upon the respondent signing a letter of undertaking and a leaseback agreement, that is, the GRRA. Thus, there was no legal basis to allow the alternative claim for loss of rental when the respondent had not complied with the conditions in the CRG and that he had been at all the times in possession of the property.

[14] The respondent urged us not to interfere with the findings of facts by the learned JC and reminded us of the principle that the appellate court will not readily interfere with the findings of facts which the law had entrusted to the trial judge: *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163. It was also the respondent's contention that under the terms of the CRG, the respondent was not required to enter into a guaranteed rental return agreement. We do not find any merit in this contention as the guaranteed rental return under the CRG is conditional upon the respondent agreeing to leaseback the property to the appellant.

[15] We agree with the appellant that the alternative claim for loss of rental is contrary to the respondent's own pleading and should not be allowed. It is clear from the statement of claim that the alternative claim for loss of rental is not based on a separate cause of action. It cannot be based on the appellant's alleged breach of the terms and conditions of the CRG as the respondent had not complied with the conditions stated therein. It would also be premature to claim specific performance of the CRG for similar reason that the respondent had not complied with the conditions stated therein. The guarantee for rental return is subject to the proviso that the respondent, among others, agree to lease the property to the appellant.

[16] The respondent's pleaded case is that the appellant had committed a fundamental breach of the CRG which entitled him to terminate the sale agreement. The alleged breach is that the appellant had imposed certain terms and conditions in the GRRA which are unreasonable and contrary to the CRG. In our view once the prayer for the said declaration is dismissed and that there was no breach of the sale agreement, the alternative claim should be dismissed as a matter of course.

[17] We note that the respondent's pleading is quite unusual. The respondent is asking for a declaration that he had rightly terminated the sale agreement, not on the ground that there was a fundamental breach of the terms of the sale agreement itself, but on an extraneous ground, namely, for 'fundamental breach of the rental guaranteed scheme'. There is no provision in the sale agreement on guaranteed rental return. Thus, there is absolutely no basis to allow the alternative claim for loss of rental.

[18] For the aforesaid reasons, we allowed the appeal and set aside the order of the learned JC, with costs here and below.